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DKR CONSULTING LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DKR CONSULTING LLC,

Plaintiff,

v.

PINTEREST, INC.,

Defendant.

Case No. 4:18-cv-05383-JSW

JOINT CASE MANAGEMENT STATEMENT

Pursuant to Civil Local Rule 16-9 and this Court's July 10, 2019 Notice Scheduling Initial Case Management Conference (Dkt #45), Plaintiff DKR Consulting LLC ("DKR") and Defendant Pinterest, Inc. ("Pinterest") submit this revised Joint Case Management Report.

I. JURISDICTION & SERVICE

This Court has jurisdiction over patent claims under 35 U.S.C. §281 and 28 U.S.C. §§1331, 1338(a) providing for federal question jurisdiction of actions relating to patents and trademarks. No issues have been raised regarding this Court's jurisdiction and all parties have been served.

II. FACTS

Plaintiff's Statement

Plaintiff is a North Carolina corporation and is the owner by assignment of the entire interests in and to the '298 Patent, issued on June 13, 2017, naming Mr. David Robb, Mr. Grant Neerings, Mr. Cameron Patterson, Mr. Joseph Rodriguez, Mr. Quinton Richard Harris, and Mr. Benjamin Cook as the inventors. Defendant is a California corporation with its principal place of business in San Francisco.

Plaintiff's principal, Mr. David K. Robb ("Mr. Robb") was the CEO/Owner of DIY Media, Inc., which previously owned the '298 Patent.

DIY Media, Inc. had a business relationship with Defendant. DIY Media's business relationship with Defendant included having DIY Media's ShopPost platform integrated with Pinterest's platform for a period of time.

In or about April, 2017 DIY Media, Inc. assigned the '298 Patent to Mr. Robb and in or about August of 2017, Mr. Robb and Pinterest, represented by Mr. Henry Lien, entered into a Non-Disclosure Agreement ("NDA") to discuss the possibility of entering into a patent licensing agreement for the '298 Patent.

After the NDA was signed, Mr. Robb provided Defendant with DIY Media's documents, including the '298 Patent. Following the exchange of documents and of emails, DIY Media attempted for over 3 months to reach Defendant and its representative Mr. Henry Lien without success.

Defendant's exchange did not result in a licensing agreement for the '298 Patent. After the exchange between Mr. Robb and Defendant, the '298 Patent was assigned to Plaintiff. Plaintiff alleges that Defendant makes, uses, sells and offer for sale and distributes material components of accused systems

1 nationwide in the United States. Plaintiff alleges that the accused systems include systems for the
 2 distribution of multimedia content and the consummation of transactions between content owners,
 3 content distributors and consumers in a manner claimed in the '298 Patent. Defendant's systems which
 4 infringe include Pinterest's "Buyable Pin" system (the "Accused System")

5 After Plaintiff filed its complaint in this case, Defendant Pinterest removed the Buyable Pins from its
 6 system and are now called Rich Pins and Product Pins.

7 Defendant's Statement

8 Pinterest does not infringe the '298 Patent. As Pinterest explained in its motion to dismiss (Dkt
 9 #26), each independent claim of the '298 Patent requires a processor configured for "displaying, in the
 10 web browser, a portable web widget." '298 patent at claim 1 and 24. The patent defines this "portable
 11 web widget" as "portable software that can be installed and executed within a hypertext-markup-
 12 language web page by an end user that does not require additional compilation." '298 patent, at col. 1, ll.
 13 59–62. Moreover, the claims all require the "portable web widget" to include additional components
 14 such as a "transaction processing component" that "complete[s] a commercial transaction in the
 15 embedded electronic commerce store." '298 patent at claim 1 and 24.

16 DKR has no plausible theory as to why the software accused by DKR—namely, Pinterest's
 17 mobile application—meets these (and other) limitations of the '298 patent. By way of example,
 18 Pinterest's mobile application is a native application and does not display the accused "Buyable Pins" in
 19 a web browser. As a result, when DKR points to the "Buyable Pins" displayed in Pinterest's native
 20 mobile application, DKR has not identified a "portable web widget" displayed "in the web browser."¹

21 Moreover, the "Buyable Pins" accused by DKR are not "portable web widgets" as defined by the
 22 patent. Buyable pins are not "portable software that can be installed and executed within a hypertext-
 23 markup-language web page by an end user." '298 patent, at col. 1, ll. 59–62. These pins also lack other
 24 elements of the claims including the "transaction processing component" because the commercial
 25

26
 27 ¹ In addition, earlier this year, Pinterest ended support for the accused "Buyable Pin" instrumentality for
 28 reasons unrelated to this litigation. DKR now states that it may accuse "Product Pins" and "Shoppable
 Pins," but neither such feature is identified in the Complaint, and DKR lacks a good faith basis to accuse
 either. For example, in each instance, the user is directed to the retailer's website to make a purchase.

1 transaction is not completed within the buyable pin or even within the mobile application.

2 In addition, the '298 patent is invalid at least because the prior art anticipates what DKR claims as
3 its invention. By way of example, an e-commerce solution by Amazon called aStore would invalidate
4 the '298 patent under the patent scope alleged by DKR in Complaint.

5 Finally, DKR tries to obscure the lack of any infringement claim by reference to an alleged
6 business relationship with Pinterest and by reference to an NDA. While it is unclear what DKR means
7 by "having DIY Media's ShopPost platform integrated with Pinterest's platform" (other than the fact that
8 DIY Media used Pinterest's services), there is no allegation that Pinterest copied "Buyable Pins" from
9 information learned from DIY Media. And DKR's NDA reference misstates the purpose of the NDA at
10 least as understood by Pinterest. In particular, on August 14, 2017, a patent broker reached out to in-
11 house counsel for what Pinterest understood as a discussion to purchase a patent portfolio. Pinterest
12 requested the broker sign its standard NDA to enable discussions surrounding those patents. Pinterest
13 did not conclude that the portfolio was worth buying, and at no point did Pinterest conclude that it
14 infringes the claims of the '298 patent.

15 Plaintiff's Response To Defendant's Statement

16 Plaintiff's statement is argumentative, not factual and thus, in view of the argumentative nature of
17 Defendant's Statement, Plaintiff feels compelled to respond.

18 Defendant Pinterest's motion to dismiss (Dkt#26) was denied by the Court on its order from June
19 5, 2019 (Dkt #41). The Court explained "The Court finds that the arguments from both parties are
20 premised upon their respective factual positions on the meaning and breadth of the patent claim terms.
21 The definition and understanding of the key claim term "portable web widget" is essential to the
22 resolution of the dispute. Defendant sets out its understanding of the terms, and argues that the meaning
23 is well known and common. (Dkt. No. 31, Opp. Br. at 6.) Plaintiff disagrees. Because this factual dispute
24 is more appropriate for resolution in the context of a claim construction, the Court finds the motion to
25 dismiss for failure to state a claim is improper at this procedural posture and DENIES the motion. (See p.
26 4, Dkt #41)"

27 Defendant's assertions are based on an inaccurate assessment of the infringement assertion as
28 clearly set forth in the charts. Defendant asserts that "Pinterest's mobile application is a native

1 application” ... “and is not a web browser”. This assertion is incorrect because Pinterest mobile
2 application has a built-in “web browser” functionalities and allows for access to the web and performs
3 product based searches and accesses third party web sites. Accordingly, the Defendant’s argument that
4 the functionality of a “web browser” in the Pinterest application does not make Pinterest application a
5 “web browser” is disingenuous.

6 Pinterest also incorrectly asserts that ““Buyable Pins” accused by DKR are not “portable web
7 widgets” as defined by the patent” because “Buyable pins are not “portable software that can be installed
8 and executed” ... “by an end user”. Defendant is disingenuous when it improperly attempts to import
9 portions of the “BACKGROUND” section of the specification of the `298 patent into the claims.
10 Furthermore, Pins are set up or associated by a seller (i.e. content owner) with specific purchasable
11 products in a manner recited in the patent and a purchaser can execute those pins to purchase the
12 purchasable products.

13 Pinterest also asserts that “pins also lack other elements of the claims including the “transaction
14 processing component” because the commercial transaction is not completed within the buyable pin or
15 even within the mobile application”. This is also incorrect as the purchase as indicated above, can be
16 completed without leaving Pinterest application.

17 As to the remaining argument, without an identification and explanation as to which specific
18 feature of the Amazon’s aStore relate to the elements of the claim, it is not possible to address this
19 general assertion of invalidity, which was- raised for the first time on December 13, 2018.- Plaintiff will
20 respond to- this assertion once provided with more specific information

21 **III. LEGAL ISSUES**

22 The parties dispute whether the `298 patent is infringed. Defendant disputes the validity of the
23 `298 patent. In particular, Pinterest contends that the asserted claims are not infringed as a matter of law,
24 and that at least under the scope of the claims asserted by DKR, those claims are anticipated as a matter
25 of law by the prior art.

26 **IV. MOTIONS**

27 Pinterest moved the Court to dismiss the Complaint on December 13, 2018. The motion was
28 denied by the Court on June 5, 2019 (Dkt #41).

1 In addition, after receiving DKR's July 24, 2019 infringement contentions, Pinterest sent a letter
2 to DKR identifying deficiencies with the contentions and requesting that DKR confirm by August 5,
3 2019 that it would supplement its contentions on or before August 9, 2019. Pinterest explained that it
4 needed Patent Local Rule 3-1-compliant contentions to formulate its defense, including the identification
5 of prior art and the preparation of invalidity contentions. Pinterest also informed DKR that should DKR
6 refuse to provide infringement contentions that comply with the Local Rules, Pinterest would raise these
7 issues at the upcoming CMC and, if necessary, would move the Court to strike DKR's infringement
8 contentions.

9 On August 4, 2019, counsel for DKR stated they had drafted a response, that their client was
10 reviewing the response, and that they would forward their response prior to August 9, 2019. On August
11 8, 2019, counsel for DKR stated they would not be able to send a response by August 9, 2019, and that
12 they would forward their response over the weekend. On August 12, 2019, counsel for Pinterest emailed
13 counsel for DKR, stating they had not received any response and requesting DKR's response. After
14 further correspondence, on August 15, 2019, counsel for DKR suggested that the parties move all the
15 dates in the CMC Statement filed July 10, 2019 by one month and that DKR provide a new set of
16 infringement contentions. As a result, the parties have agreed to a schedule that includes an additional
17 month for each deadline, and Pinterest will review the amended infringement contentions to be served by
18 DKR.

19 It is Plaintiff's position that the infringement contentions and its accompanying chart are
20 sufficient and fully complies with the local rules.

21 The parties agreed to move the due date for Infringement Contentions to August 26, 2019 and
22 Plaintiff agreed to provide Defendant with more details.

23 **V. AMENDMENT OF PLEADINGS**

24 The parties agree that the deadline to amend pleadings has passed, and that any further
25 amendments must be supported by a showing of good cause.

26 **VI. EVIDENCE PRESERVATION**

27 The parties reviewed the Guidelines Relating to the Discovery of Electronically Stored
28 Information ("ESI Guidelines") and have taken steps to preserve evidence relevant to the issues

reasonably evident in this action.

The parties met and conferred pursuant to Fed. R. Civ. P. 26(f) and propose the discovery plan set forth below.

VII. DISCLOSURES

The parties have served their initial disclosures.

VIII. DISCOVERY

Pinterest served DKR with a first set of interrogatories and a first set of requests for production on July 30, 2019. No other discovery has been taken to date. The parties anticipate the scope of discovery will be tailored to the following subjects:

- (i) the technical details of the Accused System;
- (ii) the corresponding revenue generated therefrom;
- (iii) '298 patent and its prosecution;
- (iv) prior art to the '298 patent;
- (v) ownership and assignments of the '298 patent; and
- (vi) license(s) related to the inventions claimed in the '298 patent.

A. Form of Production

Plaintiff's Position

Plaintiff requests that both parties follow the following format of production:

The parties will produce all documents in PDF format. The parties will produce all files that can easily be converted into PDF in PDF format with Bates Labels for each produced document and that includes a separate PDF for each document produced. The parties may request production in native format, and the producing party shall make such files available. Physical files will be scanned and produced as PDF and the originals will be maintained should the requesting party wish to see them.

Defendant's Position

Pinterest does not agree that it must produce documents in PDF format. Pinterest proposes the following based upon Plaintiff's interest in producing documents in PDF format:

Pinterest will produce all documents and electronically stored information ("ESI") either

1 in single-page Tagged Image File Format (“.tiff”) with a corresponding load file that includes
2 Bates Labels for each produced document or in the document’s native format, at its election. If
3 any TIFF image cannot be viewed, however, DKR may request the native files that were
4 associated with the unviewable TIFF images, and Pinterest shall provide such files or search
5 PDF files associated with the unviewable TIFF images.

6 DKR will produce all documents and ESI in searchable PDF format with a corresponding
7 load file that includes Bates Labels for each produced documents and that includes a separate
8 PDF for each document produced. If DKR’s production format proves unmanageable or
9 insufficient (including, for example, if DKR produces multiple documents in a single PDF file, if
10 DKR’s production fails to maintain familial relationship between documents or if DKR’s
11 production obscures important metadata), Pinterest may request production in native format, and
12 DKR shall provide such files. The parties would negotiate what metadata will be provided as
13 part of load files but agree that neither party shall be required to provide more metadata than the
14 other.

15 **B. Privileged Materials**

16 The parties agree to adhere to Federal Rule of Civil Procedure 26(b)(5) in their assertion
17 of a privilege or the work product, common interest or joint defense doctrines to withhold
18 otherwise relevant documents. Moreover, the parties agree that each party asserting such a
19 privilege or doctrine shall log the withheld document in a manner that, without revealing
20 information itself privileged or protected, will enable other parties to assess the claim. Neither
21 party, however, shall be required to log withheld documents that were created on or after August
22 31, 2018, where those document were created by or sent to or from outside or in-house counsel
23 for a party. The withheld document log for a given production must be provided within thirty
24 (30) days of request by another party.

25 In addition, the parties agree that production of privileged materials or attorney work
26 product without an express written notice of intent to waive the attorney-client privilege or work
27 product protection shall not be deemed a waiver of the attorney-client privilege or work product
28 protection so long as the producing party informs the requesting party of the identity of the

1 materials mistakenly produced. Such materials should not be used and should be returned to the
2 producing party under those circumstances.

3 **C. Discovery Plan**

4 The parties propose that the discovery rules found in the Federal Rules of Civil Procedure
5 should not be modified except to clarify that expert depositions shall not count towards the limits
6 set forth by the Federal Rules of Civil Procedure. The parties have the following dispute
7 regarding the production of ESI.

8 Plaintiff's Position on ESI Production

9 Plaintiff proposes that no party shall have to search for or produce information that is not
10 reasonably related to the issues in this case. Moreover, for other email information, Plaintiff
11 proposes that:

- 12 • Email production requests shall be phased to occur after the parties have
13 exchanged initial disclosures and basic documentation about the patents, the prior art, the
14 accused instrumentalities, and the relevant finances.
- 15 • Emails will not be within the scope of the first request for production.
- 16 • Email production shall identify the custodian, search terms, and time frame. The
17 parties shall cooperate to identify the proper custodians, proper search terms and proper
18 timeframe as set forth in the Guidelines.
- 19 • The parties agree to limit the number of custodians and search term per custodian
20 in their request for production of email to a reasonable one.

21 Defendant's Position on ESI Production

22 Pinterest proposes that no party shall have to search for or produce information unrelated
23 to patent ownership, patent assertion against Pinterest, or monetary damages in email or other
24 forms of electronic correspondence (collectively "email"), which are the categories of email
25 information that the parties could identify as being potentially relevant.

26 Moreover, for other email information, Defendants propose that the Court adopt the
27 Northern District of California's model stipulation and order on ESI discovery including that:

- 28 • General ESI production requests under Federal Rules of Civil Procedure 34 and

45 shall not include email or other forms of electronic correspondence. To obtain email parties must propound specific email production requests.

- Email production requests shall only be propounded for specific issues, rather than general discovery of a product or business.

- Email production requests shall be phased to occur after the parties have exchanged initial disclosures and basic documentation about the patents, the prior art, the accused instrumentalities, and the relevant finances.

- Email production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms and proper timeframe as set forth in the Guidelines.

- Each requesting party shall limit its email production requests to a total of five custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for additional custodians, upon showing a distinct need based on the size, complexity, and issues of this specific case. Cost-shifting may be considered as part of any such request.

- Each requesting party shall limit its email production requests to a total of five search terms per custodian per party. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for additional search terms per custodian, upon showing a distinct need based on the size, complexity, and issues of this specific case. The Court encourages the parties to confer on a process to test the efficacy of the search terms. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they are variants of the same word. Use of narrowing search criteria (*e.g.*, "and," "but not," "w/x") is encouraged to limit the production and shall be considered

when determining whether to shift costs for disproportionate discovery. Should a party serve email production requests with search terms beyond the limits agreed to by the parties or granted by the Court pursuant to this paragraph, this shall be considered in determining whether any party shall bear all reasonable costs caused by such additional discovery.

D. Protective Order

Pinterest has provided DKR with a draft of a protective order on July 19, 2019, that is based on a model protective order provided by the Northern District of California. Pinterest is awaiting comments from DKR on the proposed protective order.

IX. CLASS ACTIONS

This matter is not a class action.

X. RELATED CASES

None.

XI. RELIEF

Plaintiff's Statement

That Defendant be held to have infringed the '298 Patent under 35 U.S.C. § 271(a)(b) and (c). That Defendant has acted with knowledge of the '298 Patent. That judgment be entered for Plaintiff against Defendant, for Plaintiff's damages according to proof, and for any additional damages attributable to infringements of Plaintiff's patent rights and for enhanced damages under 35 U.S.C. § 284 and § 285. That judgment be entered for Plaintiff against Defendant, adequate to compensate Plaintiff, for reasonable royalties and/or other statutory damages based upon Defendant's acts of patent infringement and for its other violations of law under 35 U.S.C. § 271, § 284 and § 285. That Defendant be required to account for all gains, profits, and advantages derived from its acts of infringement and for its other violations of law and that Plaintiff be awarded damages in the amount of such profits under 35 U.S.C. § 284 and § 285. That the actions of Defendant be found willful. That judgment be entered for Plaintiff and against Defendant, for enhancement of the damages awarded for patent infringement under 35 U.S.C. § 284 and § 285. That the actions of Defendant be found exceptional under 35 U.S.C. § 285. That Plaintiff be granted judgment against the Defendant for Plaintiff's costs and attorney's

fees under 35 U.S.C. § 285 and/or the inherent powers of the Court. That the Court grant such other, further, and different relief as the Court deems proper under the circumstances.

Defendant's Statement

Pinterest contends that because it does not infringe the asserted claims of the '298 patent, and because the asserted claims of '298 patent are invalid, DKR should take nothing by way of its Complaint. Moreover, because DKR has no plausible basis to claim infringement by Pinterest and because Pinterest has informed DKR of this fact but DKR has nonetheless persisted with this action without a reasonable basis to do so, Pinterest will ask the Court to hold the actions of DKR to be exceptional under 35 U.S.C. § 285 and to award judgment against DKR for Pinterest's costs and attorney's fees under 35 U.S.C. § 285 and/or the inherent powers of the Court.

XII. SETTLEMENT AND ADR

A Settlement Conference was held before Magistrate Judge Hixson on July 31, 2019. The case did not settle. Magistrate Judge Hixson ordered the parties to notify his Courtroom Deputy once this Court enters a claim construction order to schedule a further telephone call.

XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The parties declined to proceed before a Magistrate Judge for all purposes.

XIV. OTHER REFERENCES

The parties agree that this case is not suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

XV. NARROWING OF ISSUES

The parties are not aware of any issues that can be narrowed by agreement at this time.

XVI. EXPEDITED TRIAL PROCEDURE

This case is not the type of case that can be handled under the Expedited Trial Procedure of General Order 64.

XVII. SCHEDULING

The parties propose the schedule set forth below:

Deadline Item	Deadline Date
Deadline to serve amended disclosure of asserted claims and infringement contentions that comply with Local Patent Rule 3-1)	August 26, 2018
Deadline to serve invalidity contentions: (Local Patent Rule 3-3)	October 9, 2019 ²
Deadline to exchange proposed terms for construction: (Local Patent Rule 4-1)	October 30, 2019
Deadline to serve damages contentions: (Local Patent Rule 3-8)	November 30, 2019
Deadline to exchange preliminary claim constructions and extrinsic evidence: (Local Patent Rule 4-2)	December 22, 2019
Deadline to serve responsive damages contentions: (Local Patent Rule 3-9)	January 13 2019
Deadline to complete and file joint claim construction and prehearing statements: (Local Patent Rule 4-2)	January 16, 2019
Deadline for completion of claim construction discovery: (Local Patent Rule 4-4)	January 23, 2019
Deadline to serve opening brief on claim construction: (Local Patent Rule 4-5)	January 30, 2019
Deadline to serve responsive brief on claim construction: (Local Patent Rule 4-5)	February 20, 2020
Deadline to serve reply brief on claim construction: (Local Patent Rule 4-5)	February 27, 2020
Claim Construction Hearing	Subject to Court's Calendar
Further Joint Case Management Report and Conference	Within 30 days of claim construction ruling

² Should DKR's amended infringement contentions fail to meet the requirements of Patent Local Rule 3-1, Pinterest reserves the right to move to strike those contentions and request that deadlines that follow from DKR's compliance with this local rule be extended.

1 The parties do not propose a schedule beyond the further joint case management report
2 and conference. By that conference, the parties will have received the Court's order on claim
3 construction and will be better positioned to provide suggestions on what the remainder of the
4 schedule should be, including specifically expert and fact discovery deadlines.

5 **XVIII. TRIAL**

6 DKR anticipates that this will be a five-day trial.

7 Pinterest believes that this case will be resolved in its favor pursuant to motion.
8 However, any remaining issues would be tried to a jury with such a trial lasting approximately 7
9 days, depending on the remaining issues to be tried.

10 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

11 Pinterest has filed its "Certification of Interested Entities or Persons" as required by Civil
12 Local Rule 3-16.

13 **XX. PROFESSIONAL CONDUCT**

14 The parties' counsel has reviewed the Guidelines for Professional Conduct for the
15 Northern District of California.

16 **XXI. OTHER**

17 None.

18 Dated: August 16, 2019

DURIE TANGRI LLP

19 By:

20 /s/ Matthew W. Samuels
21 MATTHEW W. SAMUELS

22 Attorney for Defendant
23 PINTEREST, INC.

1 Dated: August 16, 2019

DNL ZITO

2
3 By: /s/ Luiz Felipe Oliveira
LUIZ FELIPE OLIVEIRA

4 Attorney for Plaintiff
5 DKR CONSULTING LLC

6 **FILER'S ATTESTATION**

7 Pursuant to Civil L.R. 5-1(i)(3), regarding signatures, I, Matthew W. Samuels, attest that
8 concurrence in the filing of this document has been obtained.

9 Dated: August 16, 2019

10 /s/ Matthew W. Samuels
MATTHEW W. SAMUELS

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Matthew W. Samuels

Matthew W. Samuels